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# Committee on Claims

**Wednesday**

**November 9, 2005**

**9:45 A.M.**

**28 House Office Building**

**Allan G. Bense**  
**Speaker**

**John Quinones**  
**Chair**



# **Committee Meeting Notice**

## **HOUSE OF REPRESENTATIVES**

**Speaker Allan G. Bense**

### **Claims Committee**

**Start Date and Time:** Wednesday, November 09, 2005 09:45 am

**End Date and Time:** Wednesday, November 09, 2005 11:00 am

**Location:** 28 HOB

**Duration:** 1.25 hrs

#### **Consideration of the following proposed committee bill(s):**

PCB CLAM 06-01 -- Joint Legislative Claims Committee

PCB CLAM 06-02 -- Adoption of Joint Rule 8 regarding the Joint Legislative Claims Committee

Presentation of interim project report entitled, "Review of House and Senate Claim Bill Procedures."

**NOTICE FINALIZED on 10/28/2005 16:12 by WATSON.LOIS**

**Review of House and  
Senate Claim Bill  
Procedures**

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# **Review of House and Senate Claim Bill Procedures**

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Policy Options for Legislative Consideration

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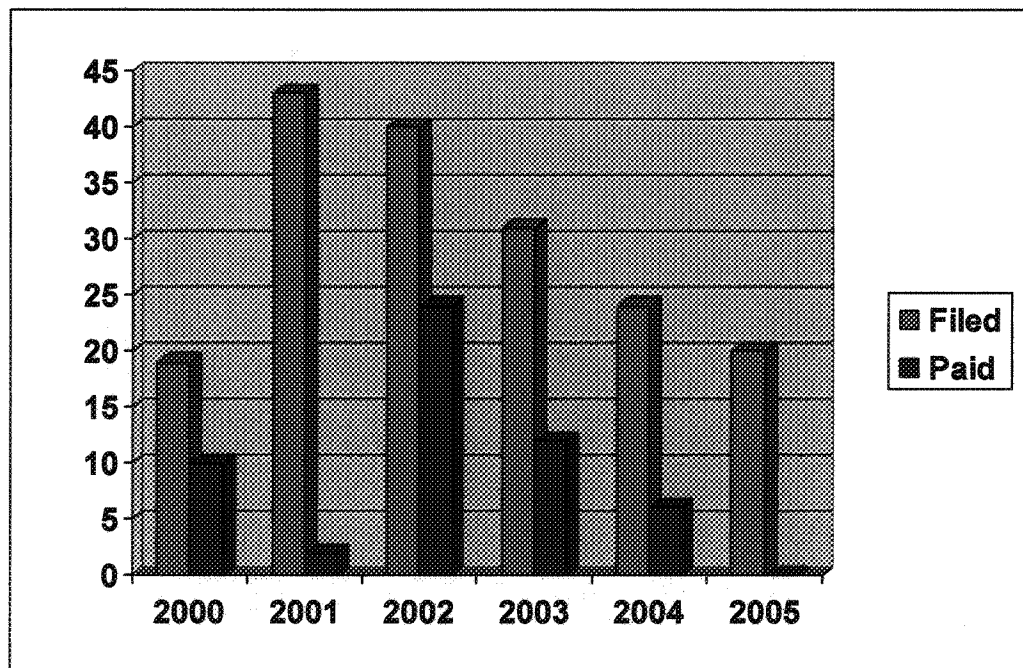
## The Claim Bill Process

A claim bill, sometimes called a relief act, is a bill that compensates a particular individual or entity for injuries or losses occasioned by the negligence or error of a public officer or entity. It is a means by which an injured party may recover damages even though the public officer or agency involved may be immune from suit pursuant to the constitutional doctrine of sovereign immunity.

Generally, a claimant who seeks to enforce either a judgment or a settlement agreement against a governmental entity for a tort action<sup>1</sup> (typically negligence or wrongful death) in an amount that exceeds the statutory caps<sup>2</sup> requests a Member of the Legislature to file a claim bill. Once filed, the presiding officers each appoint a Special Master to review the claim via a hearing and report back to the body. Claims which are reported unfavorably are typically withdrawn by the sponsor, though the Legislature is not bound by the recommendation of the Special Master. Once a recommendation is made, the bill proceeds through each chamber's committee process. After final passage, the bill is either signed by the Governor, vetoed, or allowed to become law without his signature. Once the act becomes a law, the government entity is required to pay the award pursuant to the terms of the law.

Historically, the passage rate for all types of claim bills over the past 10 years has declined.

**Number of Claim Bills Filed and Paid per Year**



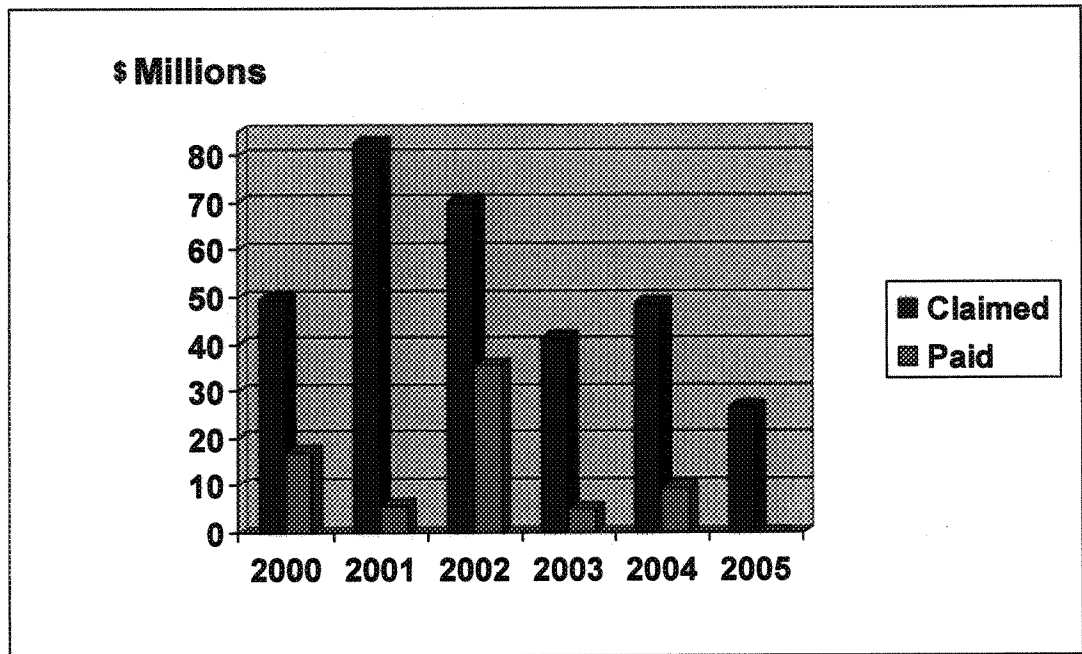
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<sup>1</sup> A tort claim is private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages. Black's Law Dictionary (5<sup>th</sup> Edition 1979).

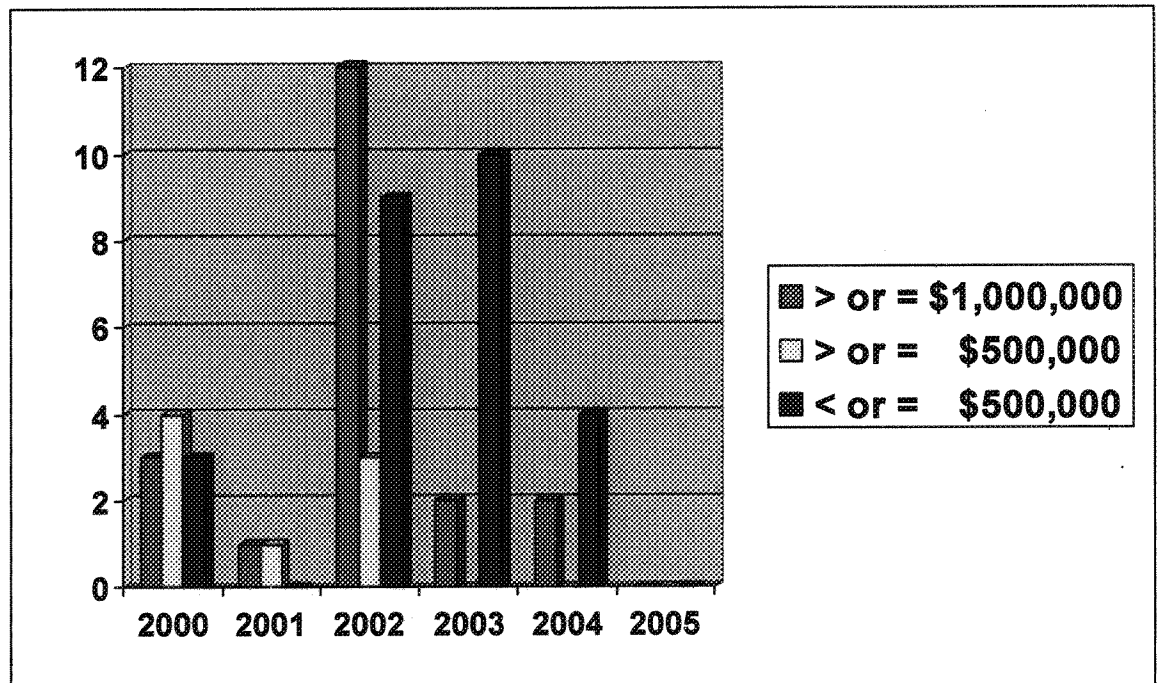
<sup>2</sup> See s. 768.28, F.S., and discussion under "Sovereign Immunity."

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**Amount of Total Claims Paid Per Year (2000 – 2005)**

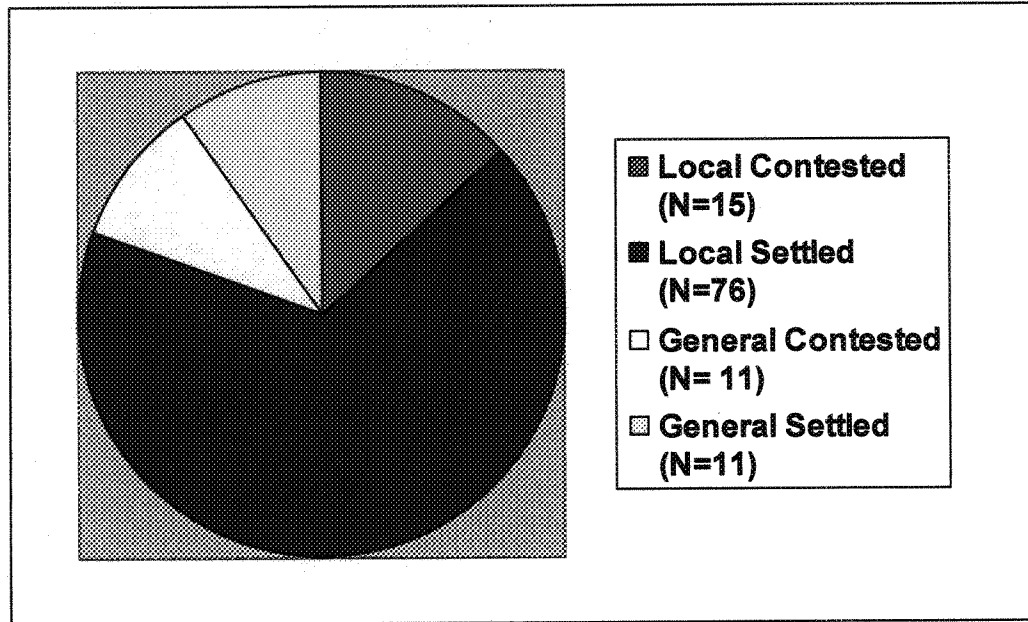


**Dollar Amounts of Individual Claims Paid (2000 – 2005)**



Regardless of the declining passage rate, it is clear that local, settled claim bills have the highest passage rate.

### Number of Passed Claim Bills (1996 – 2005)



Typically, the Legislature's policy on handling claim bills stems from policy decisions regarding the extent of the waiver of sovereign immunity; whether it is appropriate to waive immunity at all, and if so, in what circumstances. Other policy considerations concern how an award is divided between the claimant, their attorney, and their lobbyists.

This report examines historical data regarding the passage of claim bills, and analyzes several specific issues including the expedited review of settled claims, the statutory caps on liability, and the application of the statutory attorney's fee limits to lobbying fees. Lastly, this report suggests various policy options that might be considered in future discussions regarding the claim bill process.

## Sovereign Immunity

Sovereign immunity is a doctrine that prohibits suits against the government without the government's consent. The Florida Constitution addresses sovereign immunity in Article X, section 13 as follows:

**Suits Against the State.**—Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

In 1973, the Florida Legislature enacted section 768.28, F.S. This section provides that the state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. Sovereign immunity extends to all state agencies or subdivisions of the state, which by statutory definition includes the executive departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state, including state university boards of trustees; counties and municipalities; and corporations primarily



acting as instrumentalities or agencies of the state, counties, or municipalities, including the Florida Space Authority.<sup>3</sup> Liability does not include punitive damages<sup>4</sup> or interest for the period before judgment.

The statute imposes a \$100,000 limit per person, and a \$200,000 limit per incident, on the collectability of any tort judgment based on the government's liability. These limits do not preclude plaintiffs from obtaining judgments in excess of the statutory cap; however, plaintiffs cannot force the government to pay damages that exceed the recovery cap. Florida law requires a claimant to petition the Legislature in accordance with its rules, to seek an appropriation to pay a judgment against the state or state agency.<sup>5</sup> In fact, the legislative appropriation is the sole method to compensate a tort claimant in an amount that exceeds the caps,<sup>6</sup> and such act is considered a matter of legislative grace.<sup>7</sup>

It is important to note that the limited statutory waiver of sovereign immunity does not waive the state's immunity from suit in federal court, as such immunity is guaranteed by the Eleventh Amendment to the Constitution of the United States.<sup>8</sup>

## Comparison of House and Senate Rules

Both the House and the Senate have distinct rules governing the procedures regarding claim bills. The rules of each chamber are adopted biannually, and can be amended by the adoption of a report recommended by the Rules and Calendar Council by a majority vote.<sup>9</sup> The House generally addresses claim bills in Rule 5.6 of the Rules of the Florida House of Representatives (2004-2006), and the Senate generally addresses claim bills in Rule 4. 81, Rules of the Florida Senate (2004-2006).

Joint Rules apply to both the House and the Senate, and are adopted by concurrent resolution. Joint Rules continue in effect from session to session or Legislature to Legislature until repealed by concurrent resolution.<sup>10</sup> The Joint Rules address such subjects as lobbyist registration and reporting, the review period for the general appropriations bill; legislative support services; the Joint Legislative Auditing Committee; the Auditor General; the Office of Program Policy Analysis and Government Accountability (OPPAGA); and the Joint Legislative Budget Commission. The Joint Rules do not currently address the handling of claim bills.

See Appendix A for a comparison of House and Senate Rules regarding the treatment of claim bills.

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<sup>3</sup> Section 768.28(2), F.S.

<sup>4</sup> Punitive damages are distinguished from compensatory damages in that punitive damages are intended to punish the defendant for a wrong aggravated by violence, malice, fraud, or wanton or wicked conduct on the part of the defendant. Black's Law Dictionary (5<sup>th</sup> Edition 1979). In Florida, a non-government defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. Section 768.72, F.S.

<sup>5</sup> Section 11.066, F.S.

<sup>6</sup> Notwithstanding the limited waiver of sovereign immunity provided by statute, the government may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action of the Legislature, but the government shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of obtaining insurance coverage for tortuous acts in excess of the statutory caps. Section 768.28(5), F.S.

<sup>7</sup> See *Gamble v. Wells*, 450 So.2d 850, 852 (Fla. 1984).

<sup>8</sup> Section 768.28(18), F.S.

<sup>9</sup> See Rule 13.3 of the Rules of the House of Representatives (2004-2006), and Rule 11.3 of the Florida Senate (2004-2006). Note that the Senate refers to its Committee on Rules and Calendar.

<sup>10</sup> See Joint Rule 8.1 of the Joint Rules of the Florida Legislature (2004-2006).

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# Analysis of Specified Issues

## Statutory Caps on Liability

The statutory caps on liability were established in 1973, and last increased in 1981 to prohibit the collection of more than \$100,000 per person and \$200,000 per incident against the government without Legislative approval.<sup>11</sup> Since 1981, 4 attempts have been made to increase or remove the caps, none successful. Adjusted for inflation, the caps as of June, 2005 would be \$207,810 per person and \$415,621 per incident.<sup>12</sup>

It has been suggested that increasing the statutory caps on liability would decrease the number of claim bills coming before the legislature, under the assumption that more claims would be payable without the need for Legislative approval. This assumption is only true if it is assumed that the caps are perceived by litigants as a ceiling on government liability, rather than a floor.

The State of Florida Division of Risk Management (hereinafter referred to as "the Division")<sup>13</sup> is responsible for administering a state self-insurance fund to provide insurance for general liability (and other types of claims) in proceedings against the state.<sup>14</sup> In fiscal year 2003-2004, the Division reported that 1,485 general and automobile liability claims were paid,<sup>15</sup> totaling \$8,928,098.<sup>16</sup> The average cost per claim was \$6,012.<sup>17</sup> Over the 3 year period from 2003-2005, the Division of Risk Management paid 99% of the liability claims determined to be meritorious.<sup>18</sup>

Note that information is unavailable to determine how many claims against local government entities were settled within the statutory limits. Several states have caps that are lower for local governments than the caps for claims against the state.<sup>19</sup>

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<sup>11</sup> See ch. 81-317, L.O.F.

<sup>12</sup> As calculated by staff of the Finance and Tax Committee of the Florida House of Representatives on June 9, 2005. Using a CPI for all Southern urban consumers, the caps would be \$205,181 per person and \$410,363 per incident.

<sup>13</sup> The State of Florida Division of Risk Management is administratively housed under the Office of the Chief Financial Officer. The mission of the Division is to ensure that participating State agencies are provided quality workers' compensation, liability, federal civil rights, auto liability, and property insurance coverage at reasonable rates by providing self-insurance, purchase of insurance, claims handling, and technical assistance in managing risk. 2003-2004 Annual Report of the State of Florida Division of Risk Management.

<sup>14</sup> Section 284.30, F.S.

<sup>15</sup> 2003-2004 Annual Report of the State of Florida Division of Risk Management, p. 17. Paid claims in fiscal year 2003-2004 occurred in fiscal year 1999-2000 and have had 4 years of claim development ending on June 30, 2004.

<sup>16</sup> *Id.* at p. 17.

<sup>17</sup> *Id.* at p. 17.

<sup>18</sup> Data provided by Division of Risk Management.

<sup>19</sup> New Hampshire has caps of \$150,000/\$500,000 for local claims and \$250,000/\$2 million for state claims; see N.H. Revs. Stat. Ann. Section 541-B:14 and 507-B:4. Pennsylvania provides a \$500,000 cap for local claims and a \$250,000/\$1 million cap for claims against the state; see Pa. Stat. Ann. 42 ss. 8553 and 8528.

## **Policy Options Regarding Sovereign Immunity Caps**

**1. Maintain the existing statutory caps (do nothing). Currently 99% of the claims against the state are being paid within the statutory limits.<sup>20</sup>**

**2. Increase the statutory caps for local and state claims.**

### **Policy Arguments in Favor of Increasing the Caps:**

- ☐ **Fairness: keeps up with inflation.**
- ☐ **Gives local government more flexibility in settling claims against them.**

### **Policy arguments Against increasing the caps:**

- ☐ **May drive up the cost of insurance or self-insurance for local governments.**
- ☐ **Rather than increasing the ceiling, increasing the caps might have the unintended consequence of moving the floor: claimants who would have settled for the old (lower) cap amounts in order to avoid trial will now settle for the higher cap amounts.**
- ☐ **Not necessary, as the number of claim bills filed has declined over time.**

**3. Increase the caps for claims against state entities, but retain current caps against local governments.**

### **Policy Arguments in Favor of Creating Differentiated Caps:**

- ☐ **May decrease the number of claim bills.**
- ☐ **Would expedite the process for claimants.**

### **Policy Arguments Against Creating Differentiated Caps:**

- ☐ **Treats claimants differently based on which government entity employed the defendant.**
- ☐ **Unfair to protect local governments, but not the state government from inflation.**
- ☐ **Could be subject to equal protection challenges.<sup>21</sup>**

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<sup>20</sup> Percentage extrapolated using 1,485 claims paid by the Division of Risk Management in 2003-2004, and 8 general claims filed in 2003 and 2004, for a total of 1493 general claims.

- ☐ Decreases legislative control over payment of claims between the current cap and the new cap.

#### **4. Eliminate the statutory caps and provide total immunity for the government.**

##### **Policy Arguments in Favor of Eliminating the Limited Waiver of Immunity:**

- ☐ Protects public funds.
- ☐ Allows government to operate without threat of suit.

##### **Policy Arguments Against Eliminating the Limited Waiver of Immunity:**

- ☐ Could be subject to constitutional access to courts challenges.<sup>22</sup>
- ☐ Fails to deter wrongful conduct by government officials.<sup>23</sup>
- ☐ Limits public knowledge of government improprieties.<sup>24</sup>

## **Expedited Review of Settled Claims**

Both House and Senate Rules provide that the hearing and consideration of claim bills shall be held in abeyance until all available administrative and judicial remedies have been exhausted, except where the parties have executed a written settlement agreement.<sup>25</sup> As a general matter, settled claim bills have a much higher rate of passage than contested claims.

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<sup>21</sup> Equal protection rarely becomes an issue unless state action impacts a suspect class or fundamental right. When no suspect class is disturbed, and when no fundamental rights or liberties are violated, the Equal Protection Clause "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." Detecting Constitutional Problems in Florida Legislation - 2000, published by the Civil Justice Council of the Florida House of Representatives, p. 52, citing *McGowan v. Maryland*, 366 U.S. 420, 425 (1961). The Florida Supreme Court has upheld the application of the statutory caps on municipal liability in *s. 768.28(5), F.S.*, and stated that *s. 768.28* furthers the philosophy of Florida's present constitution that all local governmental entities be treated equally, and that in Florida, sovereign immunity should apply equally to all constitutionally authorized governmental entities and not in a disparate manner. *Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981).

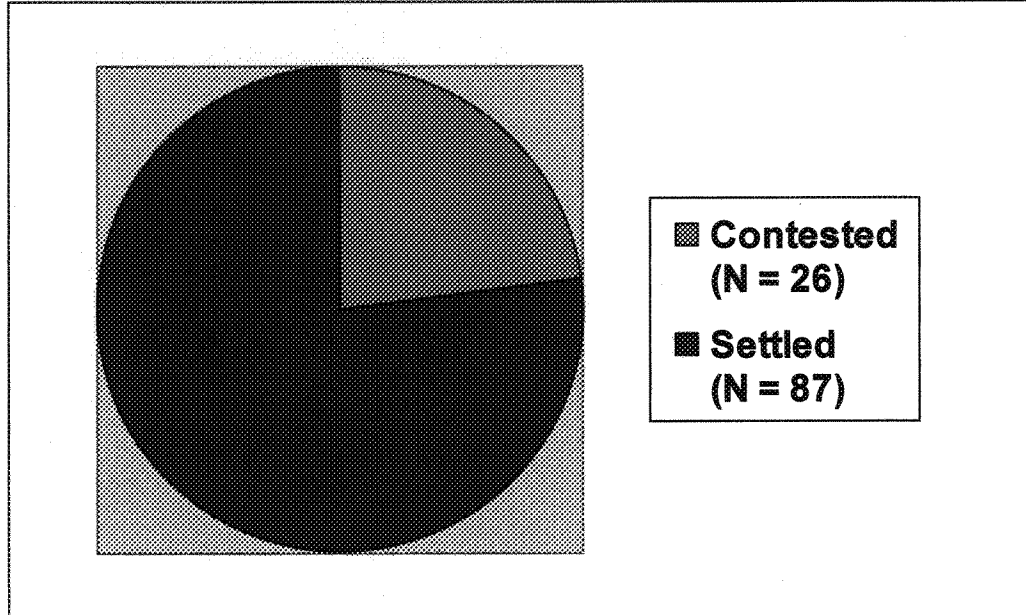
<sup>22</sup> Article 1, section 21 of the Florida Constitution provides that, "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." Where citizens have enjoyed a historical right of access to the courts, the Legislature can only eliminate a judicial remedy under two circumstances: a valid public purpose coupled with a reasonable alternative, or an overriding public necessity. An argument could be made that the provisions of Article X, section 13 of the Florida Constitution, which authorizes the Legislature to enact general laws regarding suits against the state, might be viewed as an exception to the access to courts provisions, if the Legislature chose to enact total immunity. The Florida Supreme Court has held that since there was no historical right to recover for a municipalities negligence, the case law standard established for legislative elimination of causes of action was not applicable to the statutory limitation of liability. *Cauley v. City of Jacksonville*, 403 So.2d 379 (Fla. 1981).

<sup>23</sup> Gerald T. Wetherington and Donald I. Pollock, *Tort Suits Against Government Entities in Florida*, 44 Fla. L.Rev. 1, 8 (1992).

<sup>24</sup> *Id.* at p. 28.

<sup>25</sup> See Rule 5.6(c), Rules of the Florida House of Representatives (2004-2006) and Rule 4.81(6), Rules of the Florida Senate (2004-2006).

### Settled v. Contested Claim Bills Passed (1996 – 2005)



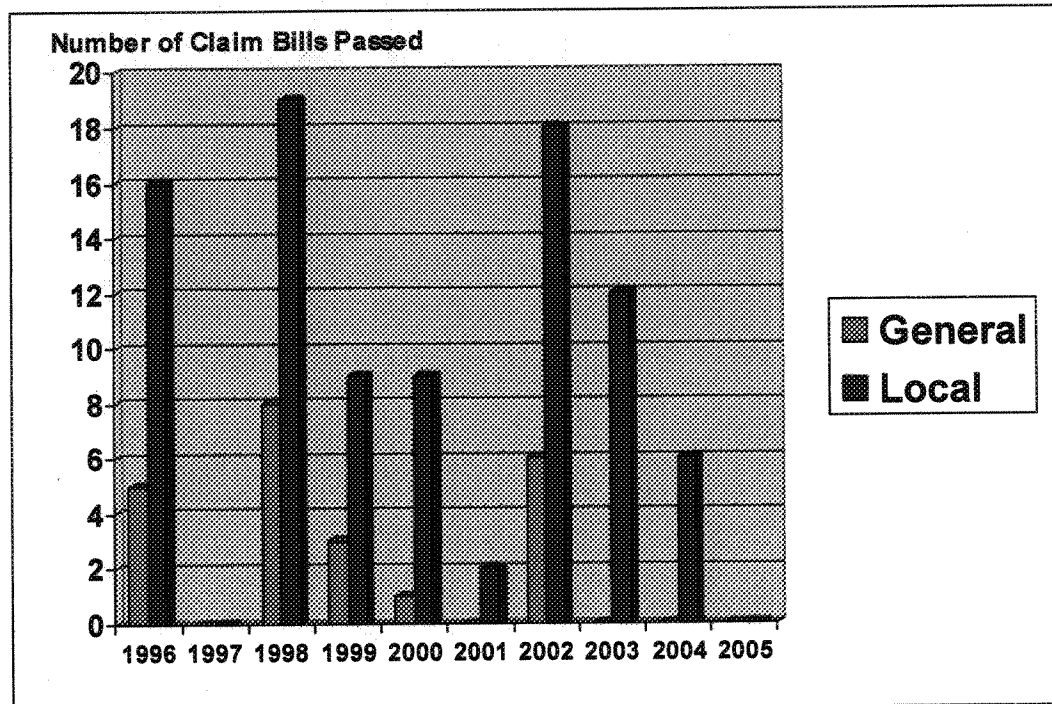
There are two types of settled claims that are presented to the Legislature for payment: local claims and general claims.

#### **Local, settled claims**

A local or special law is any legislative act that: 1) applies to an area or entity that is less than the total population of the state; and 2) contains subject matter that entitles those to whom it is applicable to the publication of notice or referendum required by the Constitution.<sup>26</sup> Generally, if the respondent is a county, municipality, school board, district, local constitutional officer, or other subdivision of the state, then the claim is a local bill. **Typically, local claim bills are funded by the local entity (the respondent), not by general revenue.** Historically, a higher percentage of local, settled claim bills pass both houses of the Legislature than do claim bills of any other type.

<sup>26</sup> See Art. III, s. 10, Fla. Const.

### General v. Local (1996 – 2005)



Notwithstanding the limited waiver of sovereign immunity provided by statute, a government entity can agree, within the limits of insurance coverage provided, to settle a claim made or judgment rendered against it without any further act of the Legislature, but the government entity will not be deemed to have waived any defense of sovereign immunity or to have increased its limits of liability as a result of obtaining insurance coverage in excess of the statutory caps.<sup>27</sup> By statute, government entities are authorized to be self-insured, to enter into risk management programs, or to purchase liability insurance for whatever coverage they choose, or to have any combination thereof, in anticipation of any claim.<sup>28</sup> Government entities that are subject to homogeneous risks may purchase insurance jointly or may join together as self-insurers to provide other means of protection against tort claims.<sup>29</sup>

It is not clear whether the authority to settle claims within the limits of insurance coverage provided extends to government entities with self-insurance. Clearly government entities are statutorily authorized to be self-insured,<sup>30</sup> but the Legislature did not include the word "self-insurance" in the language allowing settlements without further Legislative act. Thus it might be concluded that the Legislature, in enacting section 768.28(5), F.S., allowing government entities to settle claims within the limits of insurance coverage provided without further act of the Legislature, intended to exclude government entities that self-insure.<sup>31</sup>

<sup>27</sup> See s. 768.28(5), F.S.

<sup>28</sup> See s. 768.28(15) (a), F.S.

<sup>29</sup> See id.

<sup>30</sup> See id.

<sup>31</sup> *Expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another) is a canon of statutory construction. Thus, where a statute enumerates certain criteria, applications, or exceptions, it is generally interpreted to exclude all items not listed. See *Thayer v. State*, 335 So. 2d 815 (Fla. 1976).

The Florida Supreme Court shed some light on the issue by reasoning that self-insurance is not the equivalent of commercial insurance because self-insurance does not spread or share the risk. The Supreme Court found thus:

A necessary element of insurance is distribution of risk. Under [the self-insurance] plan, no premium is paid, no second party assumes the risk and no distribution of risk is accomplished.... The policy considerations behind our holdings of immunity waiver to the extent of liability insurance coverage may be stated thusly: the premium has been paid, the coverage has been extended, so it must have been intended that the benefits be paid. No such policy considerations exist here.<sup>32</sup>

However, current practice reveals that some local government entities that self-insure do so as members of a consortium and pay rates based on actuarial reports that determine the particular member's loss history. These "pools" insure the entity up to a specified amount, and then the consortium purchases insurance for the excess (re-insurance).<sup>33</sup> Thus in these circumstances, a premium is paid, the consortium assumes the risk and the risk is distributed among the participating members. It would appear that government entities that self-insure under this model might be considered as having purchased the equivalent of insurance for purposes of the ability to settle claims above the statutory caps without further legislative act.

By contrast, there are other government entities that self-insure by putting funds aside in a "rainy-day fund." These entities do not distribute risk or pay a premium. Thus it would appear that local government entities that self-insure in this manner have not purchased insurance for the purposes of the ability to settle claims above the statutory cap.

There are also government entities that purchase "claim bill insurance." By definition, this insurance only covers amounts owed by local governments in the event of the passage of a claim bill or relief act. As this type of insurance only pays out after passage of a claim bill, it would appear that such coverage would not allow local governments to settle claims without further act of the Legislature.

"Self-insurance" has been defined by the Legislature relative to other subjects. The term "self-insurance fund" is defined in the Florida Statutes relative to the Insurance Code as a group of members operating individually and collectively through a trust or corporation created for the purpose of pooling and spreading liabilities of its group members in any commercial property or casualty risk or surety insurance.<sup>34</sup> However, governmental self-insurance pools created pursuant to s. 768.28(15), F.S., are not considered commercial self-insurance funds.<sup>35</sup>

#### **Policy Options Regarding Local, Settled Claims:**

- 1. Consider self-insurance pools in which the risk is shared as the statutory equivalent of insurance for the purposes of allowing local governments to settle their claims within the amount of insurance provided without legislative approval.**

<sup>32</sup> *Hillsborough County Hospital and Welfare Board v. Taylor*, 546 So.2d 1055, 1057 (Fla. 1989) (quoting *Ponder v. Fulton-DeKalb Hospital Authority*, 353 S.E.2d 515, 517 (Ga. 1987)). Note that s. 286.28(2), F.S., which provided that waiver of sovereign immunity automatically took place up to the limits of a contract for insurance, was repealed in 1987 by ch. 87-134, L.O.F.

<sup>33</sup> The Florida School Board Insurance Trust Fund and the Florida Sheriff's Self-Insurance Trust Fund both work this way according to conversations with staff held in October and November, 2002.

<sup>34</sup> See s. 624.462, F.S.

<sup>35</sup> See s. 624.462(6), F.S.

**Policy Arguments in Favor of Expanding the Definition of “Insurance” to include specified self-insurance pools:**

- ☐ Recognizes the autonomy of local governments.
- ☐ Might decrease the number of claims bills filed.
- ☐ Expedites the process for those claimants who do settle their claims.

**Policy Arguments Against Expanding the Definition of “Insurance” to include specified self-insurance pools:**

- ☐ May drive up the cost of premiums for local governments.
- ☐ Transfers authority from the Legislature and gives it to local governments.

**2. Require local governments to carry insurance.**

**Policy Arguments in Favor of Requiring Local Governments to carry Insurance:**

- ☐ Ensure that most local claims would be paid.
- ☐ Decrease the number of claim bills filed.
- ☐ Increase autonomy of local governments to settle claims.
- ☐ Benefits the insurance industry.

**Policy Arguments Against Requiring Local Governments to Carry Insurance:**

- ☐ Decreases the autonomy of local governments in general.
- ☐ Could be subject to challenge as an unfunded mandate.<sup>36</sup>
- ☐ May harm the self-insurance industry.

**3. Allow local governments to pay settled claims without legislative approval, regardless of insurance coverage.**

**Policy Arguments in Favor of Requiring Local Governments to Settle Claims Without Legislative Approval:**

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<sup>36</sup> Article VII, section 18 of the Florida Constitution provides that unless certain requirements are met, counties and municipalities are not bound by state laws requiring them to spend money or to take action that requires the expenditure of money. Unless one of numerous exemptions or exceptions apply, such bill requires a 2/3 vote of the membership of each chamber. A super-majority vote is not required if the bill is found to have an insignificant fiscal impact. If funds are appropriated to cover the mandate or the law applies to all similarly situated persons, and the Legislature formally determines the existence of an important state interest, the Legislature may treat the bill as it would any other measure, with a majority vote required for final passage. Detecting Constitutional Problems in Florida Legislation, published by the Civil Justice Council of the Florida House of Representatives, 2000, p. 153.



- ☐ Gives local governments autonomy and flexibility to settle claims with local dollars.
- ☐ Reduces the number of claim bills.

**Policy arguments Against Requiring Local Governments to Settle Claims Without Legislative Approval:**

- ☐ Reduces legislative control over public funds.
  - ☐ May allow or encourage corruption or fraud.
4. Devise an administrative payment schedule for specified injuries and send all settled claims through an executive-branch claims adjustor. The Legislature would make a lump-sum appropriation to fund all claims approved by the adjustor.

**Policy Arguments in Favor of an Executive Branch claims adjustor:**

- ☐ Expeditious resolution of claims.
- ☐ Fair and consistent treatment of claimants.
- ☐ Decrease number of claim bills filed.

**Policy arguments Against an Executive Branch claims adjustor:**

- ☐ One-size-fits-all approach may not be equitable for all claimants.
- ☐ Difficulty in determining the schedule for payment (i.e., how much is permanent brain damage worth? How is the claimant's remaining life expectancy taken into account?)
- ☐ Loss of legislative control.
- ☐ Creates another government bureaucracy.

**Settled claims against state agencies (general claims):**

A general law is an act intended to have statewide application.<sup>37</sup> For claim bill purposes, if the respondent of the claim is a state agency, which situation would require an appropriation from the state's general revenue or from an executive agency's budget, then the claim bill is a general bill. General revenue is made up of state tax revenues and is available to the Legislature for any use; these are the revenues for which programs compete for funding.

There is frequent confusion about the source of funding for general claim bills. This confusion can generally be cleared by looking closely at the funding language of the bill. If the funds are intended to come from general revenue, then the bill language should read

<sup>37</sup> See "The Language of Lawmaking in Florida IV," compiled by John Phelps and the staff of the Office of the Clerk of the House, 1998.

that funds “are appropriated from general revenue.” If the funds are intended to come out of the agency’s budget, then the bill language should require the specific department to request transfer of existing spending authority from existing operating categories of the department. While such language is generally suggested as a punitive measure against a department, historically there have been policy considerations against requiring today’s department to pay for yesterday’s negligence occasioned by employees and leadership from previous administrations. Such policy also has the possibility of taking funds and/or services away from citizens who are not responsible for the negligence.

The State of Florida Risk Management Trust Fund has been created within the Department of Financial Services to provide insurance to state agencies for general liability, among other things.<sup>38</sup> The trust fund covers all departments of the State and their employees, agents, and volunteers for general liability, subject to the sovereign immunity caps and limitations provided by statute.<sup>39</sup> Premiums for each department are computed on a retrospective rating arrangement based upon actual losses accruing to the fund, taking into account reasonable expectations, the maintenance and stability of the fund, and the cost of insurance.<sup>40</sup>

**Trust Funds:** Trust funds are monies that are earmarked by law for very specific purposes and held in trust. Specifically, a trust fund bill sets up a special account into which certain taxes or fees are deposited and out of which funds are disbursed for a specific and exclusive purpose.<sup>41</sup> The Legislature typically has little discretion in allocation of trust fund dollars among programs, and occasionally uses trust fund monies to fund claim bills.<sup>42</sup>

#### **Policy Options Regarding Settled Claims Against State Agencies:**

1. **Increase the statutory caps for claims against state agencies, but maintain current caps for local governments. See policy arguments in section entitled “Statutory Caps on Liability”, on page 5.**

## **Application of Statutory Limit on Attorney’s Fees to Lobbying Fees**

Florida law provides that no attorney may charge, demand, receive, or collect, for services rendered, fees in excess of 25% of any judgment or settlement of a tort claim against the government.<sup>43</sup> The Florida Supreme Court has upheld the Legislature’s authority to limit attorney’s fees in a claim bill, despite the fact that the attorney had contracted for a higher amount.<sup>44</sup> Furthermore, the Florida Supreme Court has determined that the statutory 25% limitation on attorneys’ fees applies to all situations involving waiver of sovereign immunity, whether it be the underlying \$100,000/\$200,000 cap, or the excess part awarded by the

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<sup>38</sup> See s. 284.30, F.S.

<sup>39</sup> See ss. 284.31 and 768.28, F.S.

<sup>40</sup> See s. 284.36, F.S.

<sup>41</sup> See “The Language of Lawmaking in Florida IV.”

<sup>42</sup> The Department of Transportation has a trust fund out of which tort liability and settlements are paid. See s. 206.46, F.S.

<sup>43</sup> Section 768.28(8), F.S.

<sup>44</sup> *Gamble v. Wells*, 450 So.2d 850 (Fla. 1984), holding that the limitation of attorney fees did not constitute an impairment of the right to contract protected by Article 1, section 10 of the Florida Constitution.

claim bill; or the result of a settlement and voluntary payment in any amount made by a governmental respondent or by its insurance carriers.<sup>45</sup>

While lobbyists' fees are not restricted by state law, Governor Jeb Bush has adopted a policy that the payment of fees to the attorney and the lobbyist(s) should be inclusive of all expenses, and that payment should not exceed a combined total of 25% of the judgment or settlement amount paid.<sup>46</sup> The Governor requires claimant's attorneys and lobbyists to sign a letter of agreement with the policy; failure to execute said letter may result in a veto of the claim bill. It is important to note that the Legislature is not bound by the Governor's policy. An attempt to codify the inclusion of lobbyists' fees within the 25% limitation on attorneys' fees failed during the 2005 legislative session.<sup>47</sup> Also note that fees contingent upon the outcome of any specific legislative action are generally prohibited, except in the case of claim bills.<sup>48</sup>

A strong argument can be made that lobbyists' fees could be limited by the Legislature, similar to the limitation on attorneys' fees. There are several available policy options:

### **Policy Options Regarding Lobbying Fees:**

#### **1. Address lobbying fees on a case-by-case basis**

##### **Policy Arguments in Favor of Addressing Lobbying Fees on a Case-by-Case Basis:**

- ☐ The approach has been upheld by the Florida Supreme Court in regards to attorneys' fees.
- ☐ Gives the Legislature the maximum amount of flexibility in determining equity.

##### **Policy Arguments Against Addressing Lobbying Fees on a Case-by-Case Basis:**

- ☐ Might allow decisions based on politics rather than equities.

#### **2. Prohibit contingency fees for lobbying claim bill cases.**

##### **Policy Arguments in Favor of Prohibiting Contingency Fees:**

- ☐ Mitigates against windfall payments to lobbyists.

##### **Policy Arguments Against Prohibiting Contingency Fees:**

- ☐ May result in payments to lobbyists by claimants even when their claim fails.

#### **3. Limit lobbying fees to a certain percentage, or require inclusion within the attorneys' fee limitation.**

<sup>45</sup> *Ingraham v. Dade County School Board*, 450 So.2d 847 (Fla. 1984), holding that section 768.28(8), F.S. does not amount to a legislative usurpation of the power of the judiciary to regulate the practice of law.

<sup>46</sup> Governor Bush's Claim Bill Policy, updated 1/10/05.

<sup>47</sup> HB 703/SB 882 (2005).

<sup>48</sup> Sections 11.047 and 112.3217, F.S.

**Policy Arguments in Favor of Limiting Lobbying Fees:**

- ☐ Mitigates against windfall payments to lobbyists.
- ☐ Allows the claimant to keep more of the award.
- ☐ Discourages the filing of unmeritorious claims.

**Policy Arguments Against Limiting Lobbying Fees:**

- ☐ May deter attorneys from taking cases against government entities, if lobbying fees must be included in the 25% limitation on attorneys' fees.<sup>49</sup>

**4. Prohibit lobbying fees.**

**Policy Arguments in Favor of Prohibiting Lobbying Fees:**

- ☐ Allows the claimants to keep more of the award.
- ☐ Mitigates against awards based on politics.
- ☐ Discourages the filing of unmeritorious claim bills.

**Policy Arguments Against Prohibiting Lobbying Fees:**

- ☐ Unless the current system is streamlined, may result in passage of fewer meritorious claim bills.
- ☐ Promotes equal opportunity and fairness in representation before the Legislature.

**5. Require that sponsors of claim bills be located in the same jurisdiction as either the claimant or the respondent.**

**Policy Arguments in Favor of Jurisdictional Limits:**

- ☐ Indicates that the local delegation is in favor of the claim.
- ☐ Encourages decisions based on equities rather than politics.

**Policy Arguments Against Jurisdictional Limits:**

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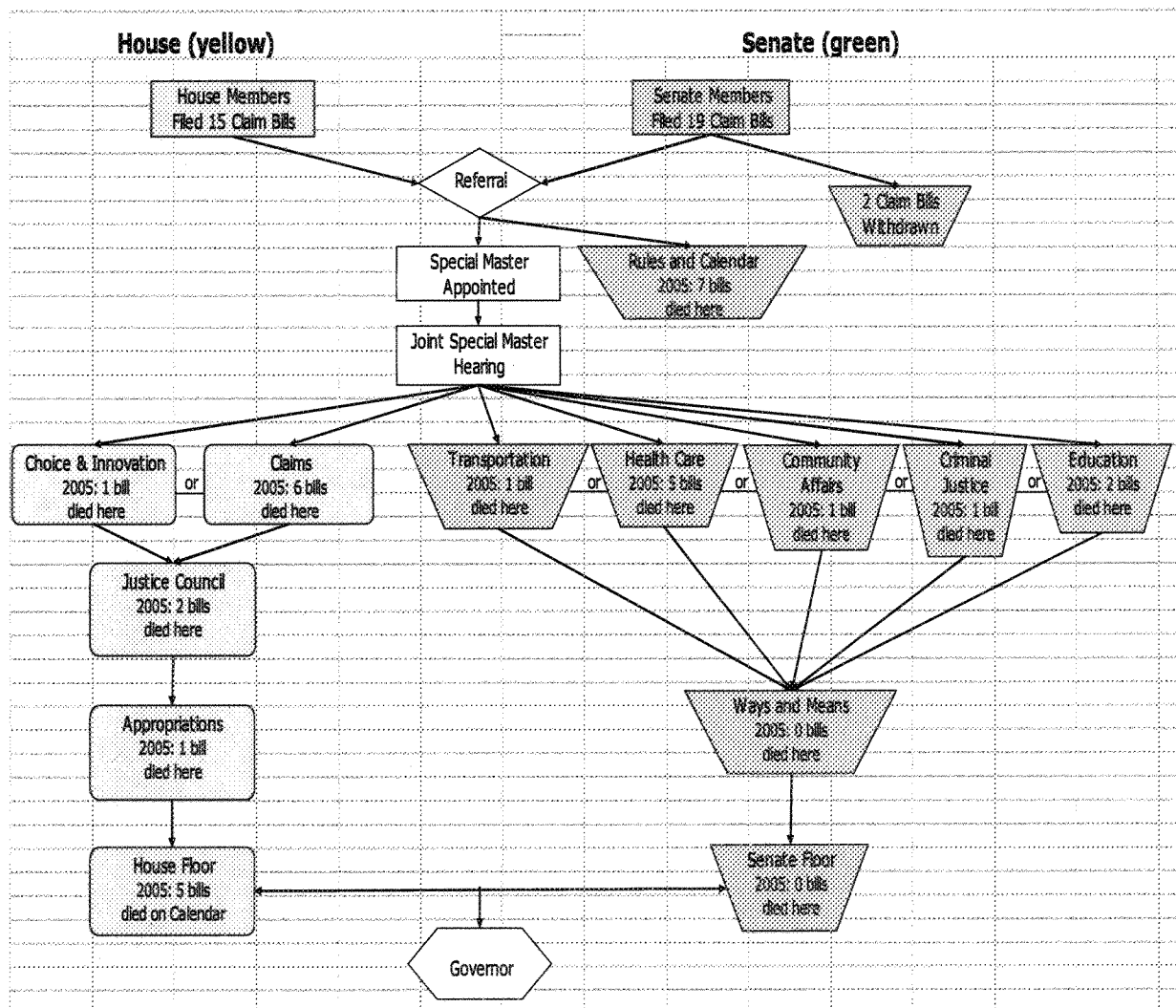
<sup>49</sup> Attorneys fees for cases against non-government defendants are limited by rule 4-1.5(B) of the Florida Bar as follows: before an answer is filed, an attorney may be compensated 33 1/3% of any recovery up to \$1M; plus 30% of any recovery between \$1 and \$2M; plus 20% of any portion of the recovery exceeding \$2M. After an answer is filed, an attorney is permitted to collect 40% of any recover up to \$1M; plus 30% of any recovery between \$1M and \$2M; plus 20% of any recovery over \$2M. For purposes of comparison, an attorney who wins a \$2M judgment against a government defendant may collect \$500,000 in fees; if the judgment was against a non-government defendant, the attorney could collect \$700,000 in fees. If lobbying fees must be included within the 25% limitation, the attorney's portion grows even smaller. Also note that Amendment 3 to the State Constitution passed in the 2004 general election, providing that an injured claimant who enters into a contingency fee agreement with an attorney in a claim for medical liability is entitled to no less than 70% of the first \$250,000.00 in all damages received by the claimant, and 90% of damages in excess of \$250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This amendment is intended to be self-executing.

- ☐ **Limits the flexibility of the claimants and gives respondents more power.**
- ☐ **Claimants who are represented by Members who refuse to file claim bills may be without access to the claim bill process.**

## Consideration of a Joint Claim Policy

As the attached flow chart demonstrates, the current system for handling claim bills includes a multitude of legislative decisions, each of which is an opportunity for a lobbyist to make a difference in the outcome of a claim bill.

### 2005 Claim Bill Process

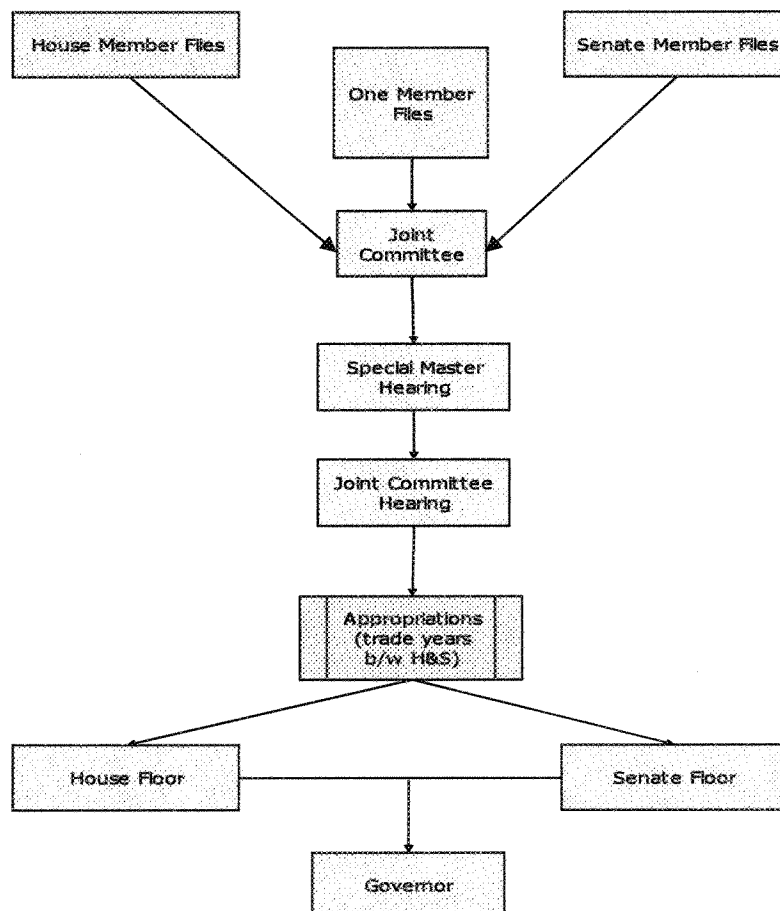


The current legislative scheme results in the perception that more lobbying is required, not less, and punishes deserving claimants in an effort to curtail perceived inequities by lobbyists.

As an alternative, consider a process that retains legislative authority over the award of claims, but simplifies the process by deleting some of the duplicative and complex

legislative decision-making requirements. The adoption of a joint rule regarding claim bills that provided for the appointment of one special master, who would hold one hearing, followed by consideration of one joint committee, and then passage by each chamber would significantly decrease the need for lobbyists, while retaining legislative authority and control. Such a process would maximize the net award to the claimant.

### Unified Claim Bill Process



## Conclusion

It would appear that the “bad rap” attributed to the claim bill process may not be wholly justified. For the most part, the Special Master process provides an objective and fair vetting of claims against government entities, in which only the deserving claimants advance. Statistics show that claims which are settled by local governments and paid by local dollars have the highest passage rate. Claims which have been neither settled nor have had all judicial remedies exhausted (equitable claims) have the lowest passage rate. These statistics portray what appears to be sound policy: the Legislature views with a skeptical eye those claims that compete for general revenue dollars (general claims), particularly those not already considered by the Judicial branch.

Legislative concern regarding the political nature of the claim bill process and the attempt to maximize the percentage of the award received by the actual claimant is squarely within legislative control. There are several policy options available, including limiting lobbyists’ fees and streamlining the process to minimize the need for outside advocacy. The Members might also choose to place more reliance on the recommendations made by the Special Master: a recommendation made by objective legislative staff who have nothing to gain or lose in the process.

In considering policy options concerning the claim bill process, the Legislature should be mindful of the delicate balance between maintaining legislative control, acknowledging the independence of local governments, and providing a fair process for those injured by the negligence of government employees or agents.



## Appendix A

### Comparison of House and Senate Rules Regarding Treatment of Claim Bills

Issue	House Rule	Senate Rule	Policy Options
Filing Deadline	Rule 5.2: must be approved for filing with the Clerk no later than noon on the first day of regular session. (March 7, 2006).	Rule 4.81(2): All claim bills shall be filed with the Secretary of the Senate on or before August 1 in order to be considered by the Senate, except that newly elected members have 60 days from the date of the election. The Senate shall not consider a House claim bill without a timely filed Senate companion. (August 1, 2005).	
Limit on Number of Bills	Rule 5.3(a): A member may not file more than six bills for a regular session. Rule 5.3(b): Local claim bills do not count toward this limit.	None.	• Consider requiring the sponsor to be from the district of either the claimant or respondent.
Appointment of Special Master	Rule 5.6(a): The Speaker may appoint a Special Master to review a claim bill or conduct a hearing if necessary.	Rule 4.81(3): If the President determines that a de novo hearing is necessary to determine liability, proximate cause, or damages, a Special Master shall conduct a hearing...	
Special Master report deadline	Rule 5.6(a): The Special Master may prepare a final report containing findings of fact, conclusions of law, and recommendations.	Rule 4.81(3): The Special Master shall ... prepare a final report containing findings of fact, conclusions of law, and recommendations no later than December 1.	
Treatment of stipulations between parties	Rule 5.6(b): Stipulations entered into by the parties are not binding on the Special Master or the House or its councils or committees.	Rule 4.81(5): Stipulations entered into by the parties are not binding on the Special Master, the Senate or its committees.	House and Senate Rules are virtually identical.

Conditions precedent	Rule 5.6(c): The hearing and consideration of a claim bill shall be held in abeyance until all available administrative and judicial remedies have been exhausted, except when there is a written settlement agreement.	Rule 4.81(6): The hearing and consideration of a claim bill shall be held in abeyance until all available administrative and judicial remedies have been exhausted; except where there is a written settlement agreement.	House and Senate Rules are virtually identical.
Referral to Committees	Rule 6.2(a): Bills, upon filing or introduction, shall be referred by the Speaker to a committee and its council and such other committees as are deemed appropriate or to the Calendar of the House. Rule 6.5: All bills carrying or affecting appropriations or tax matters shall be referred to an appropriate fiscal committee. Rule 7.1(b)(5): The Claims Committee is established within the Justice Council.	Rule 4.6(1): All bills shall be referred by the President to appropriate committees. Rule 4.8: All bills authorizing or substantially affecting appropriations or tax revenue shall be reviewed by the Committee on Ways and Means or any other appropriate committee.	House and Senate Rules are virtually identical except that the Senate does not have a Claims Committee but instead appears to refer claim bills to the substantive committee with jurisdiction over the subject matter or the governmental entity involved.



BILL

ORIGINAL

YEAR

A bill to be entitled

An act relating to the Joint Legislative Claims Committee; creating s. 11.81, F.S.; establishing the Joint Legislative Claims Committee; providing for membership and appointment; providing for governance of the committee by joint rules; providing for the designation of a special master; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 11.81, Florida Statutes, is created to read:

11.81 Joint Legislative Claims Committee.—

(1) There is created a standing joint committee of the Legislature designated the Joint Legislative Claims Committee, composed of ten members as follows: five members of the Senate to be appointed by the President of the Senate, and five members of the House of Representatives to be appointed by the Speaker of the House of Representatives. The terms of members shall be for 2 years and shall run from the organization of one Legislature to the organization of the next Legislature. Vacancies occurring during the interim period shall be filled in the same manner as the original appointment. The Speaker of the House of Representatives shall appoint the chair in the odd years and the vice chair in even years, and the President of the Senate shall appoint the chair in even years and the vice chair in odd years, from among the committee membership.

BILL

ORIGINAL

YEAR

28        (2) The committee shall be governed by joint rules of the  
 29        Senate and House of Representatives which shall remain in effect  
 30        until repealed or amended by concurrent resolution.

31        (3) The committee may, at anytime, regardless of whether  
 32        the Legislature is in session, and in connection with a  
 33        currently-filed claim bill, exercise all powers vested in a  
 34        standing or select committee pursuant to s. 11.143.

35        (4) The special master shall be designated jointly by the  
 36        Speaker and the President, and shall serve at the pleasure of  
 37        each presiding officer.

38        Section 2. This act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (for drafter's use only)

Bill No. **PCB 06-01.CLAM**

COUNCIL/COMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

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1 Council/Committee hearing bill: Claims

2 Representative(s) Quinones offered the following:

3  
4 **Amendment**

5 Remove line(s) 37 and insert:  
6 the presiding officers.

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## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB CLAM 06-01                      Joint Legislative Claims Committee  
**SPONSOR(S):** Claims Committee  
**TIED BILLS:** PCB CLAM 06-02              **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Claims Committee		Birtman	Birtman <i>Ag3</i>
1) _____	_____	_____	_____
2) _____	_____	_____	_____
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

### SUMMARY ANALYSIS

This proposed committee bill is the result of an interim project completed by the Claims Committee entitled: "Review of House and Senate Claim Bill Procedures – Policy Options for Legislative Review." The interim project suggested that a legislative process which retains legislative authority over the award of claims, but simplifies the process by deleting some of the duplicative and complex legislative decision-making requirements might decrease the need for lobbyists and maximize the net award to the claimant.

This bill provides for the statutory creation of the Joint Legislative Claims Committee and provides for appointment of membership. The Joint Legislative Claims Committee would be a standing committee governed by joint rules of the Senate and the House of Representatives (as created by PCB CLAM 06-02), and is given the authority to exercise all of the statutory powers of a standing committee. The bill also provides for the joint designation of a Special Master.

It appears that this bill has a minimal fiscal impact.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government - This bill streamlines the claims bill process and eliminates duplication of efforts between the chambers.

#### B. EFFECT OF PROPOSED CHANGES:

**Sovereign Immunity:** Sovereign immunity is a doctrine that prohibits suits against the government without the government's consent. The Florida Constitution addresses sovereign immunity in Article X, section 13 as follows:

Suits Against the State.—Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

In 1973, the Florida Legislature enacted section 768.28, F.S. This section provides that the state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. Sovereign immunity extends to all state agencies or subdivisions of the state, which by definition includes the executive departments, the Legislature, the judicial branch, the state university boards of trustees, counties, municipalities, and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.<sup>1</sup>

The statute imposes a \$100,000 limit per person, and a \$200,000 limit per incident, on the collectability of any tort judgment based on the government's liability.<sup>2</sup> These limits do not preclude plaintiffs from obtaining judgments in excess of the statutory cap; however, plaintiffs cannot force the government to pay damages that exceed the recovery cap. Florida law requires a claimant to petition the Legislature in accordance with its rules, to seek an appropriation to pay a judgment against the state or state agency.<sup>3</sup> In fact, the legislative appropriation is the sole method to compensate a tort claimant in an amount that exceeds the caps,<sup>4</sup> and such act is considered an act of legislative grace.<sup>5</sup>

This bill does not make any changes to the statutory waiver of sovereign immunity provisions, but does create a streamlined process for legislative consideration of claim bills by a joint legislative committee.

**The Current Claim Bill Process:** A claim bill, sometimes called a relief act, is a bill that compensates a particular individual or entity for injuries or losses occasioned by the negligence of a public officer or entity. It is a means by which a party who is injured by the negligence of an uninsured government entity may recover damages that exceed the statutory caps.

While each chamber maintains individual rules regarding claim bills<sup>6</sup>, generally, a claimant who seeks to enforce either a judgment or a settlement agreement against a government entity for a tort action in an amount that exceeds the statutory caps requests a Member to file a claim bill in each chamber. Once filed, the presiding officers each appoint a Special Master to review the claim via a hearing and report back to the body. Claims which are reported unfavorably by the Special Master are typically

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<sup>1</sup> Section 768.28(2), F.S.

<sup>2</sup> Section 768.28(5), F.S.

<sup>3</sup> Sections 11.066 and 768.28(5), F.S.

<sup>4</sup> Notwithstanding the limited waiver of sovereign immunity provided by statute, the government entity may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action of the Legislature. The government shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of obtaining insurance coverage for tortious acts in excess of the statutory caps. Section 768.28(5), F.S.

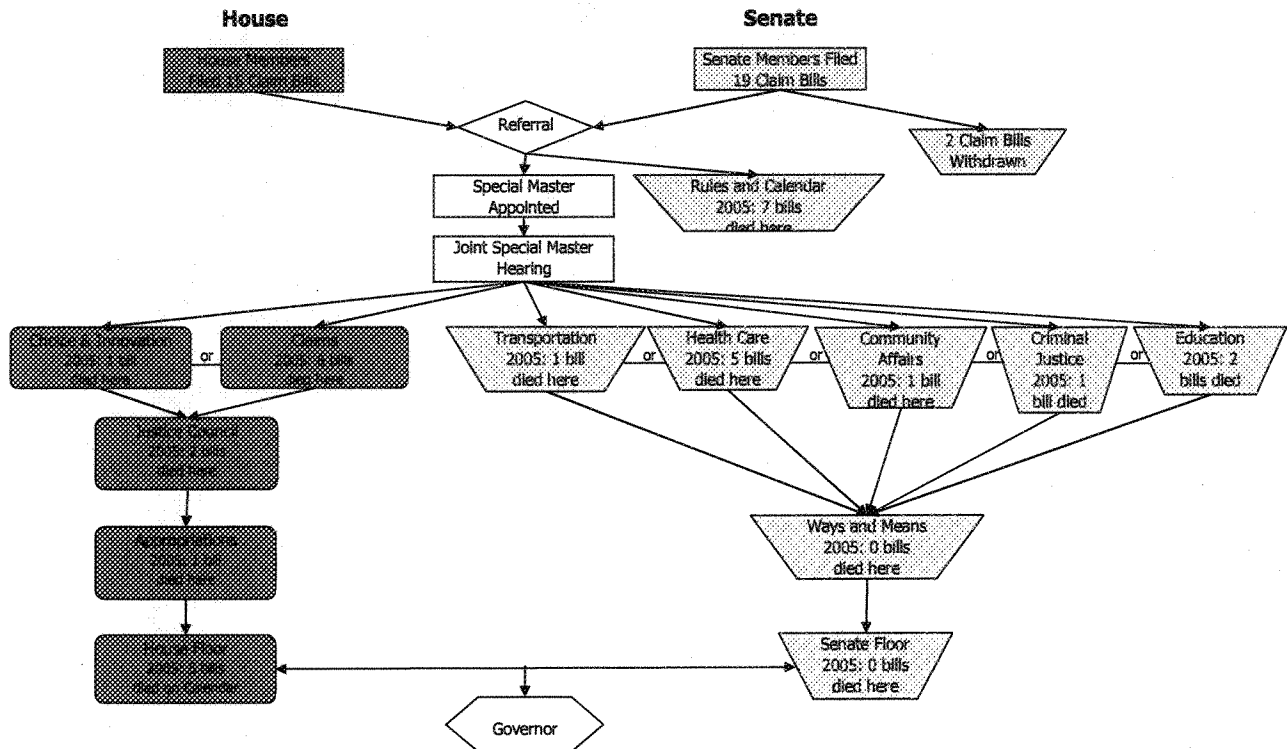
<sup>5</sup> See *Gamble v. Wells*, 450 So.2d 850, 852 (Fla. 1984).

<sup>6</sup> Rule 5.6 of the Rules of the Florida House of Representatives (2004-2006) and Rule 4.81 of the Rules of the Florida Senate (2004-2006).



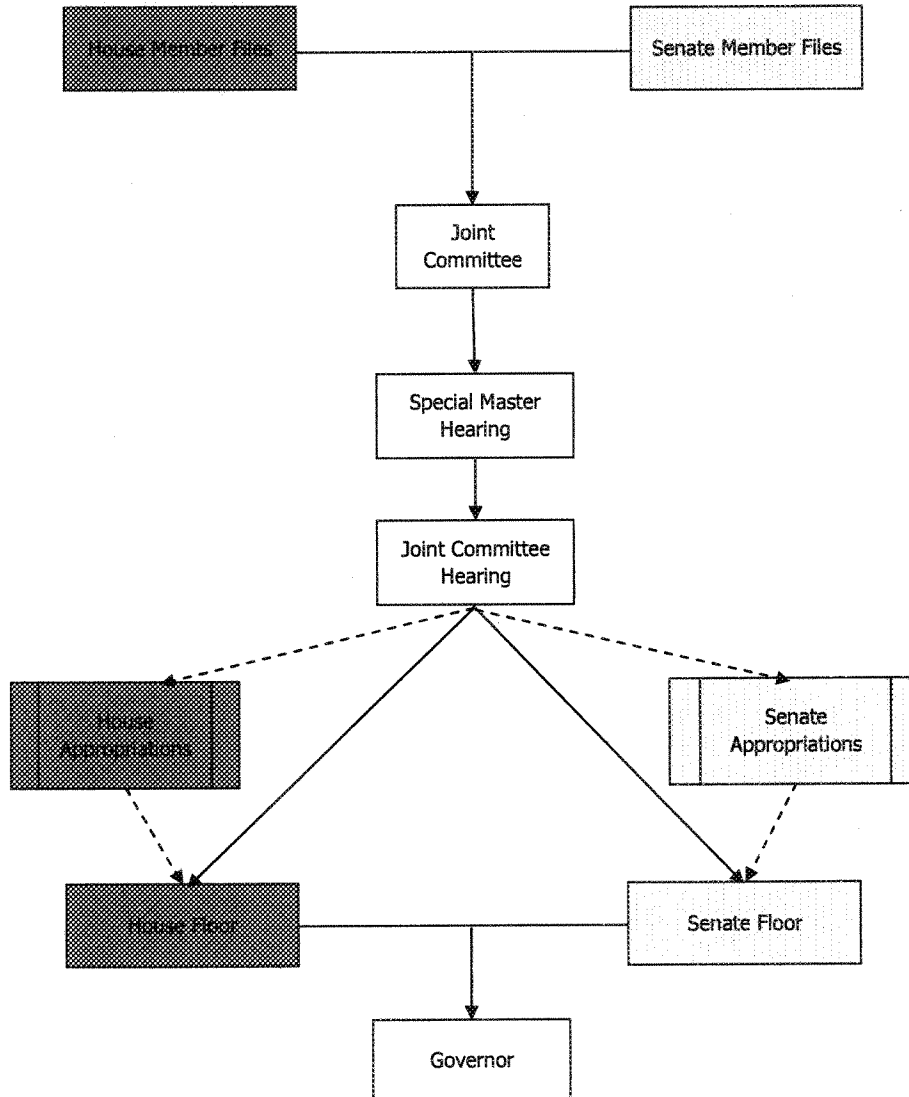
withdrawn by the sponsor, though the Legislature is not bound by the recommendation of the Special Master. Once a recommendation is made, the bill proceeds through each chamber's committee process. After final passage, the bill is either signed by the Governor, vetoed, or allowed to become law without the Governor's signature. Once the act becomes law, the government entity is required to pay the award pursuant to the terms of the law.

### 2005 Claim Bill Process



As indicated in the flowchart above, a review of the current legislative scheme for the handling of claim bills includes a multitude of legislative decisions, each of which is an opportunity for a lobbyist to make a difference in the outcome of a claim bill. The current legislative scheme results in the perception that more lobbying is required, not less, and punishes deserving claimants in an effort to curtail perceived inequities by lobbyists. It was suggested that a process that retains legislative authority over the award of claims, but simplifies the process by deleting some of the duplicative and complex legislative decision-making requirements might significantly decrease the need for lobbyists and maximize the net award to the claimant, while retaining legislative authority and control over the process, as indicated in the flowchart below:

## Unified Claim Bill Process As Contemplated by This Bill



This bill creates the Joint Legislative Claims Committee, consisting of ten Members: five appointed by the Speaker of the House of Representatives, and five appointed by the President of the Senate. The terms of the Members are for two years and run from the organization of one Legislature to the organization of the next Legislature. The Speaker of the House appoints the chair in odd years and the vice chair in even years, and the President of the Senate appoints the chair in even years and the vice chair in odd years, from among the committee membership. The bill requires that the joint committee be governed by joint rules (see PCB CLAM 06-02) which shall remain in effect until repealed or amended by concurrent resolution.<sup>7</sup> The Joint Committee is authorized to exercise all powers vested in a standing or select committee pursuant to s. 11.143, F.S., which authorizes standing committees of the legislature to:

<sup>7</sup> Joint Rule 8.1 provides that all joint rules adopted by concurrent resolution, and amendments thereto, shall continue in effect from session to session or Legislature to Legislature until repealed by concurrent resolution.

- o Invite public officials and private individuals to appear before the committee;
- o Inspect and investigate the books, records, papers, documents, data, operation and physical plant of any public agency in this state, including any confidential information;
- o Issue subpoena and other necessary process to compel the attendance of witnesses before the committee;
- o Administer oaths and affirmations to witnesses who appear before the committee;
- o Compel by subpoena duces tecum the production of any books, letters, or other documentary evidence, including any confidential information, it desires to examine; and
- o Punish by fine or imprisonment any person not a member who has been guilty of disorderly or contemptuous conduct in its presence or of a refusal to obey its lawful summons.<sup>8</sup>

Lastly, the bill provides that a Special Master be designated jointly by the Speaker and the President, who shall serve at the pleasure of the presiding officers.

#### C. SECTION DIRECTORY:

Section 1 creates the Joint Legislative Claims Committee; provides for governance by joint rules; authorizes the joint committee to exercise all powers of a standing committee; and provides for the joint designation of a Special Master.

Section 2 provides an effective date of July 1, 2006.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

For the purpose of estimating expenditures, figures are based on the operating budget of the Joint Legislative Auditing Committee, a joint committee with a small staff.

	2006-2007	2007-2008
Salary and benefits <sup>9</sup>	\$135,000	\$140,595
Office space <sup>10</sup>	11,200	11,200
Special Master travel <sup>11</sup>	12,000	12,000
Office supplies and equipment	50,000	50,000
Telephone/Computer/Fax	50,000	50,000
Start-up expenses <sup>12</sup>	<u>50,000</u>	<u>          </u>
<b>TOTAL</b>	<b>\$308,200</b>	<b>\$263,795</b>

<sup>8</sup> Imprisonment must not extend beyond the final adjournment of the session pursuant to s. 11.143(3)(c), F.S. Subsection (4)(a) of section 11.143, F.S., provides that whoever willfully affirms or swears falsely in regard to any material matter or thing before a legislative committee is guilty of false swearing, which constitutes a second degree felony.

<sup>9</sup> Salary figures are based on the average House of Representatives Staff Director salary, a mid-level committee administrative assistant salary, and an additional 30% for benefits.

<sup>10</sup> Office space is calculated at \$14 per square foot (the approximate average rental expense for space in the capitol complex) for 800 square feet.

<sup>11</sup> Special master travel is estimated at a maximum of 20 trips at \$600 per trip.

<sup>12</sup> Start-up expenses include the purchase of computers, telephones, and furniture as well as the installation of phone/computer/fax lines.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

None.

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

Both the Speaker and the President have the authority, by their own rules,<sup>13</sup> to hire/fire employees at will. This bill requires the acquiescence of both presiding officers in order to hire a Special Master, and maintains in each presiding officer the power to fire an employee at will. Query whether the presiding officers would maintain more power if they also had to agree on firing – thus each presiding officer could maintain the Special Master without danger of a unilateral dismissal by the other. Such change would also provide more stability for the Special Master, who is required to make public recommendations regarding Member's bills.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

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<sup>13</sup> See Rule 2.6, Rules of the Florida House of Representatives and Rule 1.28, Rules of the Florida Senate.



BILL

ORIGINAL

YEAR

House Concurrent Resolution

A concurrent resolution proposing the adoption of Joint Rule 8, Joint Rules of the Florida Legislature, relating to the Joint Legislative Claims Committee.

WHEREAS, Article X, section 13 of the State Constitution gives the Legislature the exclusive authority to make provision "by general law for bringing suit against the state as to all liabilities now existing or hereafter originating;" and

WHEREAS, the Legislature provided for bringing suit against the state and its agencies and subdivisions by the enactment of section 768.28, F.S.; and

WHEREAS, section 768.28, F.S., is a limited waiver of sovereign immunity and provides caps on the amount of a claim that may be paid thereunder. Judgments or settlements against uninsured state agencies or subdivisions that exceed the statutory caps may only be paid by further act of the Legislature; and

WHEREAS, Joint Rule 8 establishes an internal process of the Legislature and does not create any new rights or remedy; and

WHEREAS, Joint Rule 8 is not intended and shall not be construed to create any right to legislative hearing or consideration of a claim bill; and

WHEREAS, Joint Rule 8 shall not be construed to waive any defense of sovereign immunity or to increase the limits of liability on behalf of the state or any person or entity subject to the provisions of section 768.28, F.S.; NOW, THEREFORE,

BILL

ORIGINAL

YEAR

Be It Resolved by the House of Representatives of the State of Florida, the Senate Concurring:

That Joint Rule 8, Joint Rules of the Florida Legislature, is hereby created to read:

Joint Rule Eight

Joint Legislative Claims Committee

8.1-Filing Claim Bills

(1) All claim bills filed in the Florida Legislature shall be considered through the procedure set out in this joint rule.

(2) Claim bills shall be filed with the Secretary of the Senate and the Clerk of the House of Representatives, as required by the rules of each chamber.

(3) Local claim bills must be filed by a member of the legislative delegation where the claimant resides. If the claimant resides outside of the state, a local claim bill may be filed by any member. General claim bills may be filed by any member.

(4) Upon filing, each claim bill shall be immediately referred to the Joint Legislative Claims Committee. The bill may also be referred to one appropriations committee in each chamber, at the discretion of the presiding officer of each chamber. No additional referrals shall be made.

(5) After a claim bill has been voted favorably by the Joint Legislative Claims Committee, the bill shall be reported to the chamber in which it originated for referral to an appropriations committee, or to be placed directly on the calendar of each chamber in accordance with the rules of that chamber.

BILL

ORIGINAL

YEAR

(6) The joint committee is authorized to request that claim bills be placed on a consent calendar in both chambers.

8.2—Appointment of Members of the Joint Legislative Claims Committee; powers and duties.

(1) There shall be a Joint Legislative Claims Committee, the membership of which shall consist of five members of the House of Representatives appointed by the Speaker of the House of Representatives and five members of the Senate, appointed by the President of the Senate.

(2) The Joint Legislative Claims Committee shall meet at times and places necessary to perform the functions assigned to it.

(3) Action by a majority vote of the membership of the joint committee shall control and be conclusive on any matter considered by the Joint Legislative Claims Committee.

(4) The Speaker of the House of Representatives shall appoint the chair in the odd years and the vice chair in even years, and the President of the Senate shall appoint the chair in even years and the vice chair in odd years, from among the committee membership.

(5) The salaries and expenses of the staff of the Joint Legislative Claims Committee shall be paid from the Legislature's approved operating budget.

(6) The chair of the joint committee shall have the authority to set the committee's agenda, and set priorities for special master consideration.

(7) The joint committee is authorized to publish biannually a manual detailing the policies and procedures of the joint committee, subject to the approval by the presiding officers.



BILL

ORIGINAL

YEAR

8.3-Hearings

(1) A special master shall have the authority to control all proceedings before the special master, including the authority to:

(a) conduct hearings, prehearing conferences, and management conferences pursuant to reasonable notice;

(b) allow discovery if deemed beneficial to the consideration of the claim bill;

(c) administer oaths to witnesses;

(d) admit or reject evidence;

(e) make arrangements for preparing a record of the proceedings;

(f) accept tangible and documentary evidence;

(g) issue subpoenas as provided by law; and

(h) take such other steps as are reasonably necessary to conduct a thorough and orderly investigation of the basis for the claim bill.

(2) In all proceedings before the special master, the provisions of the Florida Rules of Civil Procedure and the Florida Evidence Code shall be instructive; however, at the discretion of the special master, the proceedings may be as informal as necessary to achieve an equitable disposition of the claim bill.

(3) Upon completion of the hearing and other proceedings incidental thereto, the special master shall prepare and submit a report to the Joint Legislative Claims Committee, which report shall contain findings of fact, conclusions of law, collateral sources of recovery and recommendations regarding the disposition of the claim bill.

BILL

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(4) Stipulations as to the amount of awards entered into by the parties are not binding upon the special master or upon the House of Representatives, the Senate, or any member of any committee thereof.

(5) The hearing and consideration of a claim bill shall be held in abeyance until all available administrative and judicial remedies have been exhausted, except that the hearing and consideration of a claim that is still within the judicial or administrative system may proceed when the parties have executed a written settlement agreement.

(6) The special master and the joint committee are authorized to examine lobbying fees regarding any filed claim bill. Lobbying fees shall be presumed excessive if they are more than:

(a) 3% of the total amount awarded in the bill for a claim that is settled when filed; or

(b) 5% of the total amount awarded in the bill for a claim that is not settled when filed.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. (for drafter's use only)

Bill No. **PCB 06-02.CLAM**

COUNCIL/COMMITTEE ACTION

ADOPTED	___	(Y/N)
ADOPTED AS AMENDED	___	(Y/N)
ADOPTED W/O OBJECTION	___	(Y/N)
FAILED TO ADOPT	___	(Y/N)
WITHDRAWN	___	(Y/N)
OTHER	_____	

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Council/Committee hearing bill: Claims

Representative(s) Quinones offered the following:

**Amendment**

On lines 3, 19, 21, 24, 32, 34, 36, 60, and 87  
change the numeral "8" to "10"

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## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

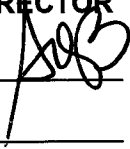
**BILL #:** PCB CLAM 06-02  
Claims Committee

Adoption of Joint Rule 8 regarding the Joint Legislative

**SPONSOR(S):** Claims Committee

**TIED BILLS:** PCB CLAM 06-01

**IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Claims Committee		Birtman	Birtman 
1)			
2)			
3)			
4)			
5)			

### SUMMARY ANALYSIS

This proposed committee bill is the result of an interim project completed by the Claims Committee entitled: "Review of House and Senate Claim Bill Procedures – Policy Options for Legislative Review." The interim project suggested that a legislative process which retains legislative authority over the award of claims, but simplifies the process by deleting some of the duplicative and complex legislative decision-making requirements might decrease the need for lobbyists and maximize the net award to the claimant.

This concurrent resolution creates Joint Rule 8, which provides a uniform legislative process for handling claim bills. The joint rule requires that local claim bills be filed by a member of the claimant's legislative delegation, provides exceptions, and provides for a streamlined referral process designed to maintain legislative control over the appropriation, and to minimize the perceived necessity for lobbyist involvement.

The joint rule maintains current House and Senate rules regarding the authority of the Special Master, the non-binding nature of stipulations entered into by the parties, and ripeness for legislative consideration.

The concurrent resolution mirrors PCB CLAM 06-01 in the creation of the Joint Legislative Claims Committee (JLCC). PCB CLAM 06-01 creates the JLCC in statute; this concurrent resolution also provides for the creation of the JLCC via joint rule. The JLCC would be comprised of ten Members of the Legislature; five Senators appointed by the President and five Representatives appointed by the Speaker. Appointment of the chair would rotate between the presiding officers, with the Speaker appointing the Chair in even years and the President appointing the Chair in odd years.

The concurrent resolution gives both the Special Master and the JLCC the authority to examine lobbying fees, and provides a presumption of excessive lobbying fees if fees are more than 3% of the total amount awarded by the bill for a settled claim or 5% of the total amount awarded by the bill for a claim that is not settled when filed.

The 'whereas' clauses in the title evince legislative intent that the joint rule does not create any new rights or remedies; shall not be construed to create any right to legislative consideration of claim bills, and does not waive the defense of sovereign immunity nor increase the limits of statutory tort liability of governmental entities.

This concurrent resolution is expected to have a minimal fiscal impact.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** pcb02.CLAM.doc  
**DATE:** 11/1/2005

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government - This bill streamlines the claims bill process and eliminates duplication of efforts between the chambers.

#### B. EFFECT OF PROPOSED CHANGES:

**Sovereign Immunity:** Sovereign immunity is a doctrine that prohibits suits against the government without the government's consent. The Florida Constitution addresses sovereign immunity in Article X, section 13 as follows:

Suits Against the State.—Provision may be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.

In 1973, the Florida Legislature enacted section 768.28, F.S. This section provides that the state and its agencies and subdivisions shall be liable for tort claims in the same manner and to the same extent as a private individual under like circumstances. Sovereign immunity extends to all state agencies or subdivisions of the state, which by definition includes the executive departments, the Legislature, the judicial branch, the state university boards of trustees, counties, municipalities, and corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities.<sup>1</sup>

The statute imposes a \$100,000 limit per person, and a \$200,000 limit per incident, on the collectability of any tort judgment based on the government's liability.<sup>2</sup> These limits do not preclude plaintiffs from obtaining judgments in excess of the statutory cap; however, plaintiffs cannot force the government to pay damages that exceed the recovery cap. Florida law requires a claimant to petition the Legislature in accordance with its rules, to seek an appropriation to pay a judgment against the state or state agency.<sup>3</sup> In fact, the legislative appropriation is the sole method to compensate a tort claimant in an amount that exceeds the caps,<sup>4</sup> and such act is considered an act of legislative grace.<sup>5</sup>

This bill does not make any changes to the statutory waiver of sovereign immunity provisions, but does create a streamlined process for legislative consideration of claim bills by a joint legislative committee. The 'whereas' clauses in the bill state that the joint rule shall not be construed to waive any defense of sovereign immunity or to increase the limits of statutory tort liability on any government entity or person subject to the provisions of s. 768.28, F.S.

**Current Rules Regarding Claim Bills:** A claim bill, sometimes called a relief act, is a bill that compensates a particular individual or entity for injuries or losses occasioned by the negligence of a public officer or entity. It is a means by which a party who is injured by the negligence of an uninsured government entity may recover damages that exceed the statutory caps.

Generally, a claimant may request that any Member of each chamber file a claim bill. Once filed, the presiding officers each appoint a Special Master to review the claim via a hearing and report back to the body. Claims which are reported unfavorably by the Special Master are typically withdrawn by the sponsor, though the Legislature is not bound by the Special Master's recommendation. Once a

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<sup>1</sup> Section 768.28(2), F.S.

<sup>2</sup> Section 768.28(5), F.S.

<sup>3</sup> Sections 11.066 and 768.28(5), F.S.

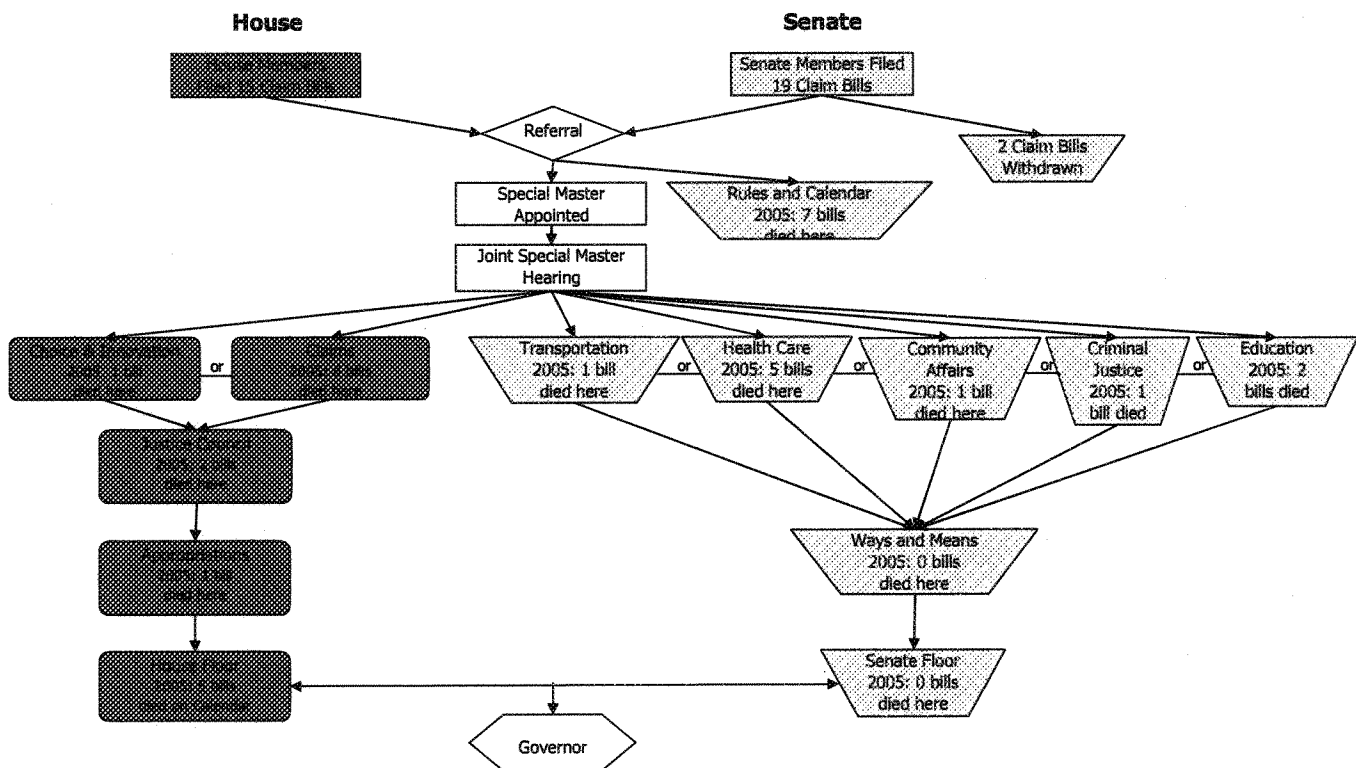
<sup>4</sup> Notwithstanding the limited waiver of sovereign immunity provided by statute, the government entity may agree, within the limits of insurance coverage provided, to settle a claim made or a judgment rendered against it without further action of the Legislature. The government shall not be deemed to have waived any defense of sovereign immunity or to have increased the limits of its liability as a result of obtaining insurance coverage for tortuous acts in excess of the statutory caps. Section 768.28(5), F.S.

<sup>5</sup> See *Gamble v. Wells*, 450 So.2d 850, 852 (Fla. 1984).

recommendation is made, the bill proceeds through each chamber's committee process. After final passage, the bill is either signed by the Governor, vetoed, or allowed to become a law without the Governor's signature.

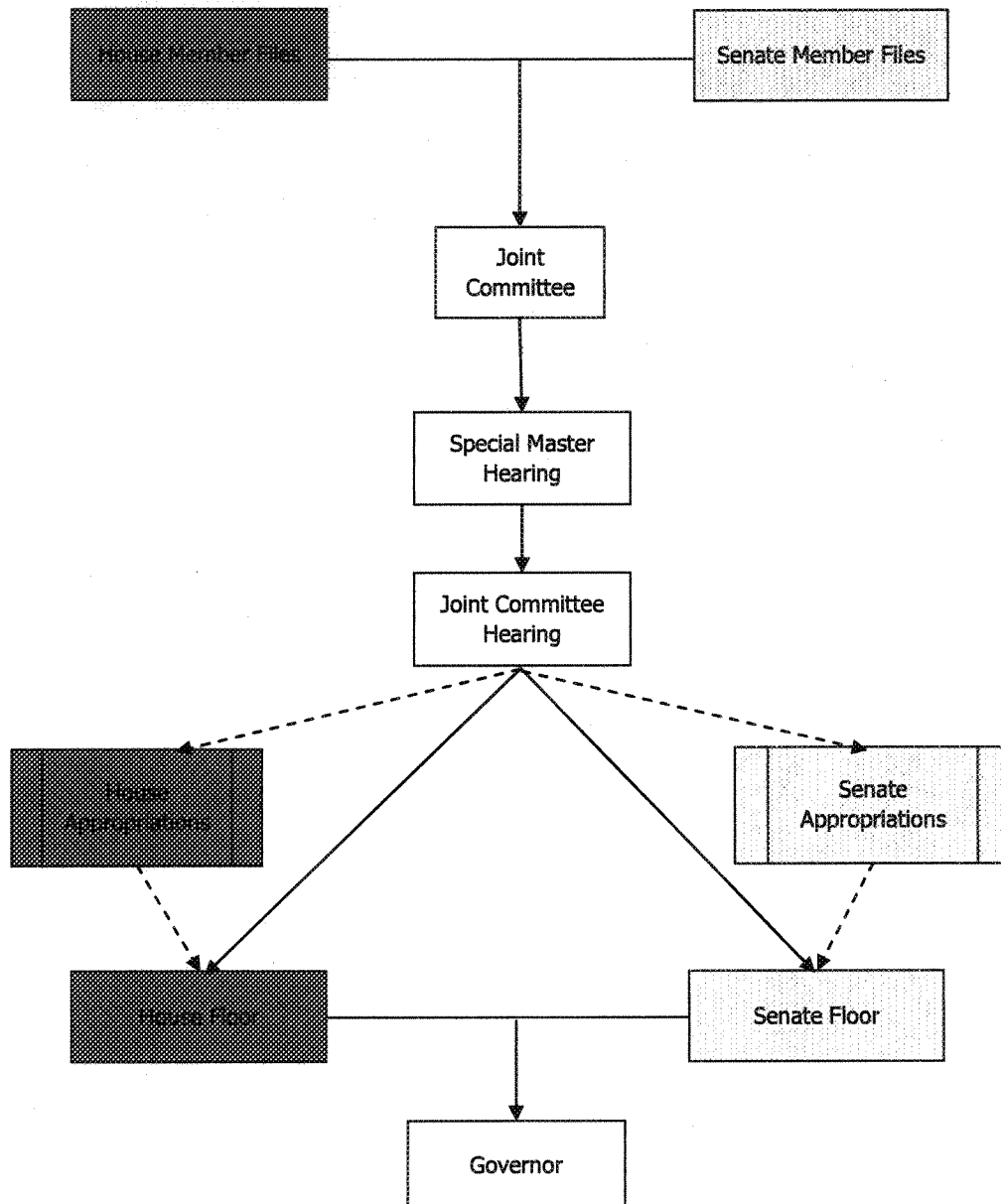
As detailed in the flow chart below, a review of the current legislative scheme for the handling of claim bills includes a multitude of legislative decisions, each of which is an opportunity for a lobbyist to make a difference in the outcome of a claim bill. The current legislative scheme results in the perception that more lobbying is required, not less, and punishes deserving claimants in an effort to curtail perceived inequities by lobbyists.

### 2005 Claim Bill Process



It was suggested that a process that retains legislative authority over the award of claims, but simplifies the process by deleting some of the duplicative and complex legislative decision-making requirements might significantly decrease the need for lobbyists and maximize the net award to the claimant, while retaining legislative authority and control over the process, as detailed in the flow chart below:

## Unified Claim Bill Process as Contemplated by This Bill



**The New Joint Rule:** There are a number of issues regarding claim bills wherein the House and Senate rules and practices are virtually identical; the new joint rule maintains the substance of each of these issues:

- The presiding officer of each chamber is authorized to appoint a Special Master to review a claim bill or conduct a hearing if necessary.<sup>6</sup> Note that the PCB CLAM 06-01 authorizes the presiding officers to jointly appoint a single Special Master, who may then conduct a hearing pursuant to the joint rule. The joint rule authorizes the Special Master to control all proceedings before the special master; conduct hearings, prehearing conferences, and management conferences pursuant to reasonable notice; allow discovery; administer oaths to witnesses; admit or reject evidence; prepare a record of the proceedings; accept tangible and documentary evidence; and issue subpoenas as

<sup>6</sup> Rule 5.6(a), Rules of the Florida House of Representatives and Rule 4.81(3), Rules of the Florida Senate.

provided by law. In this respect, the joint rule is consistent with the current practice of the Special Masters.

- The joint rule provides that in proceedings before the Special Master, the provisions of the Florida Rules of Civil Procedure and the Florida Evidence Code shall be instructive. This is consistent with the current practice of the Special Masters.
- Stipulations entered into by the parties are not binding on the Special Master, either chamber, or its committees. This is consistent with current rules of the House and Senate.<sup>7</sup>
- Hearing and consideration of claim bills shall be held in abeyance until all available judicial and administrative remedies have been exhausted, except when there is a written settlement agreement. This is consistent with current rules of the House and Senate.<sup>8</sup>

There are several areas where the rules and practices of the two chambers diverge:

- Filing deadline:
  - The House requires claim bills to be filed no later than noon on the first day of regular session (March 7, 2006).<sup>9</sup> The Senate requires claim bills to be filed by August 1<sup>st</sup> in order to be considered during the next legislative session. The Senate will not consider House bills without timely filed Senate companions.<sup>10</sup>
  - The joint rule does not include a filing deadline, thus claim bills could be filed and considered by the Special Master year round.
- Limitations on filing:
  - The House limits members to filing 6 bills during regular session. Local claim bills<sup>11</sup> do not count toward this limit.<sup>12</sup> The Senate has no limit.
  - The joint rule does not address a numerical limit, but does require that local claims be filed by a member of the claimant's legislative delegation in each chamber. Claimants who live out of state, and general claims may be filed by any member.
- Special Master report deadline:
  - The Senate requires the Special Master report to be filed no later than December 1.<sup>13</sup> The House has no deadline.
  - The joint rule does not include a deadline for submission of the Special Master's report.
- Committee referral:
  - The House typically refers claim bills to the Claims Committee, the Justice Council, and general bills get a referral to an appropriations committee. The bills are first considered by a single Special Master appointed by the Speaker. For the parties, this process poses a Special Master hearing and three committees that need to be lobbied. The Senate doesn't have a Claims Committee, and typically refers bills to the committee that has the respondent agency within its jurisdiction, as well as referring general bills to Ways and Means. Legal staff from the Senate are typically appointed by the President as Special Masters. From the parties' perspective, a Special Master's hearing is held and any of six committees need

<sup>7</sup> Rule 5.6(b), Rules of the Florida House of Representatives and Rule 4.81(5), Rules of the Florida Senate.

<sup>8</sup> Rule 5.6(c), Rules of the Florida House of Representatives and Rule 4.81(6), Rules of the Florida Senate.

<sup>9</sup> Rule 5.2, Rules of the Florida House of Representatives.

<sup>10</sup> Rule 4.81(2), Rules of the Florida Senate. Note that this rule provides an exception: newly elected members have 60 days from the date of election to file claim bills.

<sup>11</sup> A local claim bill applies to an area or entity that is less than the total population of the state and contains subject matter that entitles those to whom it is applicable to the publication of notice or referendum required by Article 3, Section 10 of the Florida Constitution. Local claim bills are generally funded by a county, municipality, school board, local constitutional officer, or other subdivision of the state. In contrast, general claim bills are intended to have statewide application and usually involve a state agency, which situation would require an appropriation from the state's general revenue or from an executive agency's budget.

<sup>12</sup> Rule 5.3(a) and (b), Rules of the Florida House of Representatives.

<sup>13</sup> Rule 4.81(3), Rules of the Florida Senate.



to be lobbied. The combined committee referrals have several effects on the process:

- Duplicative hearings by House and Senate Special Masters;
  - Opportunity for inconsistent rulings by varied Special Masters in the Senate, and between the House and the Senate; and
  - Perception that lobbyists are required to navigate through a complicated process.
- The joint rule streamlines the process by requiring that claim bills be referred to the Joint Legislative Claims Committee, and may be referred to one appropriations committee in each chamber at the discretion of the presiding officer. No further referrals are allowed by the joint rule. The joint rule provides that after the JLCC reports out a claim bill, it may be reported back to the originating chamber for consideration by an appropriations committee or placed directly on the calendar of each chamber in accordance with the rules of each chamber.

**Lobbying fees:** Lobbying fees are not restricted by state law, and while fees contingent upon the outcome of any specific legislative action are generally prohibited, a statutory exception exists for the lobbying of claim bills.<sup>14</sup> Current law restricts attorney's fees to 25% of the amount awarded in the claim bill.<sup>15</sup> The Florida Supreme Court has upheld the Legislature's authority to limit attorney's fees in claim bills, notwithstanding an attorney's contract with his/her client.<sup>16</sup>

The Governor has adopted a policy that the payment of fees to the attorney and the lobbyist(s) should not exceed a combined total of 25% of the judgment or settlement amount paid.<sup>17</sup> It is important to note that the Legislature is not bound by the Governor's policy. An attempt to codify the inclusion of lobbyist fees within the 25% limitation on attorney's fees failed during the 2005 legislative session.<sup>18</sup>

Based on the holding in *Gamble v. Wells*, wherein the Florida Supreme Court affirmed the Legislature's authority to limit attorney's fees in claim bills and held that parties cannot enter into a contract to bind the state in the exercise of its sovereign power,<sup>19</sup> an argument can be made that lobbying fees could also be limited by the Legislature on a case-by-case basis.

The joint rule authorizes the Special Master and the JLCC to examine lobbying fees relative to filed claim bills, and provides a presumption that such fees are excessive if they are more than 3% of the total amount awarded in the bill for a claim that is settled when filed; or 5% of the total amount awarded in the bill for a claim that is not settled when filed.

**Joint rules, generally:** All joint rules adopted by concurrent resolution, and amendments thereto, are continued in effect from session to session or Legislature to Legislature, until repealed by concurrent resolution.<sup>20</sup> Because the power of a future legislature cannot be limited by acts of a present or prior legislature,<sup>21</sup> it would appear that the joint rules are only binding to the extent that both chambers are willing to consider them as such.

## C. SECTION DIRECTORY:

<sup>14</sup> Sections 11.047 and 112.3217, F.S.

<sup>15</sup> Section 768.28(8), F.S.

<sup>16</sup> *Gamble v. Wells*, 450 So.2d 850 (Fla. 1984), holding that the limitation of attorney fees did not constitute an impairment of the right to contract protected by Article 1, section 10 of the Florida Constitution.

<sup>17</sup> Governor Bush's claim bill policy, updated 1/10/05.

<sup>18</sup> HB 703/SB 882 (2005).

<sup>19</sup> *Gamble v. Wells* at 853.

<sup>20</sup> Joint Rule 8, Joint Rules of the Florida Legislature.

<sup>21</sup> *Neu v. Miami Herald Publishing Co.*, 462 So.2d 821 (Fla. 1985).

The 'whereas' clauses in the title provide legislative intent that the joint rule establishes an internal process of the Legislature; does not create any new rights or remedies; shall not be construed to create any right to legislative hearing or consideration of a claim bill; and shall not be construed to waive any defense of sovereign immunity or to increase the limits of liability on behalf of the state or any person or entity subject to the provisions of s. 768.28, F.S.

Section 1 creates Joint Rule 8.1, which provides for the filing and referral of claim bills.

Section 2 creates Joint Rule 8.2, relating to the appointment of members of the Joint Legislative Claims Committee and provides powers and duties of the Committee.

Section 3 creates Joint Rule 8.3, providing for Special Master hearings, the non-binding nature of stipulations, holding a claim bill in abeyance under certain circumstances, and a presumption regarding lobbying fees.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None.

#### **2. Expenditures:**

For the purpose of estimating expenditures, figures are based on the operating budget of the Joint Legislative Auditing Committee, a joint committee with a small staff.

	2006-2007	2007-2008
Salary and benefits <sup>22</sup>	\$135,000	\$140,595
Office space <sup>23</sup>	11,200	11,200
Special Master travel <sup>24</sup>	12,000	12,000
Office supplies and equipment	50,000	50,000
Telephone/Computer/Fax	50,000	50,000
Start-up expenses <sup>25</sup>	<u>50,000</u>	<u>          </u>
<b>TOTAL</b>	<b>\$308,200</b>	<b>\$263,795</b>

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

None.

<sup>22</sup> Salary figures are based on the average House of Representatives Staff Director salary, a mid-level committee administrative assistant salary, and an additional 30% for benefits.

<sup>23</sup> Office space is calculated at \$14 per square foot (the approximate average rental expense for space in the capitol complex) for 800 square feet.

<sup>24</sup> Special master travel is estimated at a maximum of 20 trips at \$600 per trip.

<sup>25</sup> Start-up expenses include the purchase of computers, telephones, and furniture as well as the installation of phone/computer/fax lines.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

Article 3, section 4 of the Florida Constitution provides that each house shall determine its rules of procedure. The Florida Supreme Court has held that based on the Legislature's constitutional authority to adopt and enforce its own rules of legislative procedure, proceedings in conformity to legislative rules are valid when not in conflict with the Constitution.<sup>26</sup> The 'whereas' clauses in the title of the bill reflect legislative intent that the joint rule establishes an internal process of the Legislature and does not create any new rights or remedies; shall not be construed to create any right to a legislative hearing or consideration of a claim bill; and shall not be construed to waive any defense of sovereign immunity or to increase the limits of liability on behalf of the state or any person or entity subject to the provisions of s. 768.28, F.S.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The concurrent resolution creates Joint Rule 8, which already exists as part of the joint rules. It is expected that an amendment will be filed that instead creates Joint Rule 10.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

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<sup>26</sup> State ex rel. X-Cel Stores v. Lee, 122 Fla. 685 (1936).